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STRANGE REWARD

By FRANCIS X. GIACCONE
City Magistrate, Brooklyn, N. Y.



THE STRANGEST payment for legal services rendered went to Charles Phillips, Esquire. It was nothing less and nothing more fantastic than a horse-whipping from his client, Mary Wilkins. Do not imagine that it was because he lost the case; on the contrary he had achieved a complete and brilliant victory.

It all happened at the Galway Assizes held in March, 1817. At that period in history when underprivileged woman was in the eyes of the law the ward of man, it surely must have been the devil himself to inspire the lawyer for a male plaintiff to sue a lady for breach of promise to marry. It would be queer even today when she has been so completely emancipated. That the man was thirty and the woman sixty-five made it still more ridiculous.

Peter Blake, a lieutenant in the Royal Navy who had fought in the Napoleonic Wars, had retired from active duty in the full bloom of his youth. He must have been a warrior without spirit for he seems to have been the mere tool of his mother, a

determined, grasping harpy. It was at her instigation that he now planned to live the leisurely life of a country squire as the husband of the wealthy Mrs. Mary Wilkins. She was the widow of a staff surgeon of the British Army in whose arms General Wolfe had expired at Quebec. The doctor himself had died as long ago as 1775 and his widow had remained true to his memory for forty-two years. The beauty which had made her attractive during her younger years must have withered considerably during that long period; for beauty, as men and women know, is a fragile thing. Unfortunately there was a residuary vanity that still persisted. It was this weakness that had blinded her into accepting the aggressive sailor's proposal of marriage. However she was soon made to realize that the attraction was her property and not her person. The greed of the mercenary Romeo and the anxiety of his determined mother spilling themselves at each turn had finally opened the eyes of the superannuated Juliet.

When like Shakespeare's erring queen the hey-day in the blood had become tame and waited on the judgment, she had immediately withdrawn her promise of marriage. It was then that the rejected suitor had resorted to the courts for redress demanding damages as a reasonable compensation for his material losses as well as for his injured feelings and affections. To quote the words of the widow's lawyer, "Having first attacked her fortune, with herself, through the artillery of the church, and having failed in that, he now attacked her fortune through the artillery of the law."

The issue was being tried before Baron Smith and a jury of twelve men true and tried of the County of Galway. An array of formidable counsel on both sides had opposed each other with spirited combativeness during the preceding day. The indignant widow having saved her heart had now sought to rescue her property by hiring the best legal talent available. Nothing less than the great Daniel O'Connell ably assisted by the young and brilliant Charles Phillips. The burden of the trial had fallen on the younger man since the Liberator was afflicted with a cold which had incapacitated his vocal chords from active participation in the fray.

Phillips could only with difficulty enter the courtroom which

was crammed with people who had come from all sections of the county to listen to the unusual case. During the night and early morning, squires, farmers and artisans; ladies and maids; rabble and gentry, on foot, horseback and in vehicles had converged towards the county court house discussing the issues, the parties and their lawyers. Their interest was thoroughly aroused on this last day of the trial when the defense was going to counterattack. The first blow would be Phillips' opening to the jury.

Baron Smith, having assumed his place on the bench, motioned Phillips to proceed. The lawyer rose slowly, bowed to the court and then stepped towards the jury. The silence was tense as he began his address. The widow leaned forward so as not to miss a word of her defense. With unhurried confidence and with a voice at first scarcely audible the barrister explained to the jury that actions for breach of promise to marry ought seldom to be brought. Few contracts were of more paramount importance to society and certainly few ought to be more deliberate. If there ever was an excuse for such action, it was on the side of the female.

The former lieutenant began to squirm under the disapproving stare of the audience. Mrs. Wilkins nodded her head in approval. Having laid the foundation of his argument, the talent-

ed barrister said, "It has been left to me to defend my unfortunate old client from the double battery of law and love which at the age of sixty-five has been unexpectedly opened upon her. Gentlemen, how vain-glorious is the boast of beauty. How misapprehended have been the charms of youth if years and wrinkles can thus despoil their conquests and depopulate the navy of its progress and beguile the bar of its eloquence. How mistaken were all the amatory poets from Anacreon downwards who preferred the bloom of the rose and the trill of the nightingale to the saffron hide and the dulcet treble of sixty-five."

The old widow gasped in amazement. She started and arose from her seat but was quickly pulled back by a friendly neighbor. Several persons turned towards her to see the expression on her face. Some were rude enough to mock a little with a smile.

Phillips, unmindful of the emotions which he was stirring in his client, was being carried away by the impetus of his oratory. When he aimed his shafts at the poltroon who was seeking financial redress for being jilted by a female old enough to be his grandmother, his irony fell like a blight upon his victim. Indignantly the barrister cried out, "Alas, gentlemen, he could not resist his affection for a woman he had never seen. Al-

mighty love eclipsed the glories of ambition; Trafalgar and St. Vincent flitted from his memory; he gave up all for a woman as Mark Antony did before him, or like the cupid in Hudibras,

"Took his stand

Upon a widow's jointure land,
With trembling sigh and
trickling tear;

Longed for five hundred
pounds a year."

The son himself unblushing acceding to the atrocious combination by which age was to be betrayed and youth degraded and the odious union of decrepitude and precocious avarice blasphemously consecrated by the solemnities of religion."

The poor widow was again in the throes of wounded pride. It did not assuage her distress to know that it was her own lawyer who was exposing her on the pillory. But her lawyer continued, "Gentlemen, when the miserable dupe of her own dotting vanity, saw how she was treated—when she saw that all she was worth was to be surrendered to a family confiscation and that she was herself to be gibbeted in the chains of wedlock, an example to every superannuated dotard upon whose plunder the ravens of the world might calculate."

All eyes turned to Mrs. Wilkins. A hundred smiles mocked her. A beastly rustic laughed out loud. It was too much. She rushed out of the courtroom.

The whole scene was missed by Phillips who unruffled pursued his argument, "Have you ever witnessed the misery of an unmatched marriage? Have you ever witnessed the bliss by which it has been hallowed when its torch kindled at affection's altar gives to the noon of life its warmth and its lustre and blesses its evening with a more chastened but not less lovely illumination? Are you prepared to say that this rite of Heaven revered by each country, cherished by each sex, the solemnity of every church, the sacrament of one, shall be profaned into the ceremonial of an obscene and soul-degrading avarice?"

When he was finished, he was greeted by a thunder of applause. The ladies waved their handkerchiefs. The court could only with difficulty restrain the enthusiasm which the advocate had aroused by his eloquence.

The plaintiff and his lawyers were a picture of despair. There was a hurried conference among them. Then Mr. Vandeleur, chief counsel for the plaintiff, arose and made a motion to withdraw a juror. They had been completely routed and did not dare go to the jury on the issue. The defeated party abandoned the court. The judge retired. Phillips alone reigned like a monarch surrounded by many admirers who pressed his

hand, slapped him on the back and expressed in a multitude of ways their approval of him. He looked around for his client for the first time. She was not there. He picked up his hat and gloves and made his way toward the door.

"Where is Mrs. Wilkins?" he asked solicitously as he reached the open air.

The only answer was a screeching cry, "Scoundrel," coming from a rift in the crowd which was making way for the irate Mrs. Wilkins. Waving a horsewhip she was furiously advancing towards her recent defender and before anyone could intervene she had dealt several painful blows upon the helpless Phillips.

"Scoundrel," she repeated. "Saffron hide . . . superannuated dotard. I'll show you."

How far the advocate was justified in ridiculing his own client to win the action, was a question discussed for many months in the community. But that the sensibilities of a client are to be reckoned with, was a fact that Phillips did learn in the famous case of Blake versus Wilkins. However, that the remuneration for such a great victory was to be a horsewhipping, was something that everyone agreed was too absurd and entirely too ridiculous.



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Two Portraits of a Lawyer

A Satire—An Excursion in Philosophy

By H. H. EMMONS of the Canton (Ohio) Bar

H. H. EMMONS, an attorney of Canton, Ohio, in his copyrighted works has presented these two views of a lawyer. The first of these (Copyright, 1946), Mr. Emmons entitles "Why Be A Lawyer?" In the second of these appearing in Master Thoughts (Copyright, 1927), he adopts G. C. Bonney's "Portrait of a Lawyer."

WHY BE A LAWYER?

If a lawyer doesn't cuss and swear or indulge in vulgar stories—well, "he's a sissy"; and if he does he's "a rough-neck". If he doesn't use liquor, or gamble, he's "not a good sport", and "narrow"; if he drinks and gambles he's "not to be trusted". If he dresses in style he's called a "dude" or a "fop." If he breaks into print—he's done something for "a show". If he wins a case by tedious research and industry, "he wasted a lot of time so he could charge bigger fees." If he loses a lawsuit, he was "negligent" in not looking up the law. If he out-wits a client who is trying to cheat him of his fees, "he's a crook"; if a client cheats him—"that's smart business";

if he crooks a client, "he ought to be shot". If he goes to church "he's a hypocrite"; if he makes charitable contributions, "he ought to do so"—"his money comes easy"; and if he does not make donations, he's a "crab" or "tight-wad". If he shows a sympathetic attitude—he's a soft sentimentalist"; if he's a realist and technical—"he's too cold and impractical". And when he is successful—he's "simply lucky" or "had a pull". Then finally if he has been financially unfortunate and is old—remember he has no social security—he may die in the poor house—no one gives a damn. So why does anyone want to be a lawyer?

Well, yes, but—after all—the legal profession ranks very high among all the learned professions.

PORTRAIT OF A LAWYER

The other day I suggested that every profession needs the social interpreter to remind it of its duties as well as the social satirist to remind it of its dangers.

There have been many social interpreters of the lawyer's role

in society. I do not know a better interpretation than G. C. Bonney's, quoted in H. H. Emmons' Master Thoughts, viz.:

"A truly great lawyer is one of the highest products of civilization.

"He is the master of the science of human experience.

"He sells his clients the results of that experience, and is thus the merchant of wisdom.

"The labors of many generations of legislators and judges enrich his stores.

"His learning is sufficient to enable him to realize the comparative littleness of all human achievements.

"He has outlived the ambition of display before courts and juries.

"He loves justice, law, and peace.

"He has learned to bear criticism without irritation, censure without anger, and calumny without retaliation.

"He has learned how surely all schemes of evil bring disaster to those who support them, and that the granite shaft of a noble reputation cannot be destroyed by the poisoned breath of slander.

"A great lawyer will not do a mean thing for money.

"He hates vice, and delights to stand forth a conquering champion of virtue.

"The good opinions of the just are precious to his esteem, but neither the love of friends nor the fear of foes can swerve him from the path of duty.

"He esteems his office as counselor as higher than political place or scholastic distinction.

"He detests unnecessary litigation, and delights in averting danger and restoring peace by wise counsel and skilful plans.

"The good works of the counsel room are sweeter to him than the glories of the forum.

"He proves that honesty is the best policy, and that peace pays both lawyer and client better than controversy.

"In the legal contest, he will give his client the benefit of the best presentation of whatever points of fact or law may be in his power, but he will neither pervert the law nor falsify the facts to defeat an adversary.

"The motto of his battle-flag is: Fidelity to the law and the facts—Semper Fidelis."

If, coupled with fidelity to this spirit, the lawyer is a consistent student of the constantly changing stage setting of the law, he cannot go far wrong.

Freedom for the Face in Love

Mere grimaces or contemptuous facial expressions cannot amount to abusive language. *Behling v. State*, 110 Ga 754, 36 SE Rep 85, per Lewis, J.

The Confusing Witness

Contributed by

JERRY J. SULLIVAN, Pensacola, Florida

IN an election case being tried in years past a citizen well known in the town to nearly everyone was called as a witness to testify.

The witness being sworn testified as to his name, that he was a duly qualified elector in a certain district, that he had voted in the election in question and how he voted.

This witness was not on good terms with Mr. B, the examining attorney, in fact considerable hostility existed between them.

The examination was then taken in hand by Mr. B, the attorney for the opposing side on cross-examination and the following questions and answers attracted the intense interest of everyone in the Court room and became the subject of town talk for some days thereafter:

Q. Where do you live?

A. I live at No. 19 Intendent Street.

Q. How long have you lived there?

A. Since last December.

Q. Where did you live before then?

A. Next door to where I am now living.

Q. What was the number of that house?

A. No. 19.

Q. What?

A. I said number 19.

Q. You said in December last you moved from next door?

A. Yes.

Q. Is the house you moved from and the house you moved into separate houses?

A. Yes.

J. You said the house you moved from was No. 19 and the house you moved into was also numbered 19?

A. I said that.

At this point Mr. B, the examining attorney, turned away in utter disgust, shaking his head as he turned.

In a moment he renewed the examination.

Q. Are there two houses numbered 19 on that Street?

A. No.

With this Mr. B. went into a rage and gave every indication of being thoroughly exasperated. As a parting shot at the witness, he said:

Q. Do you mean to tell this Court that you moved out of No.

19 and into another house No. 19 and that there was only one house numbered 19 on that Street?

A. Yes.

Mr. B to the witness, "You are excused."

The witness left the stand with hundreds of eyes gazing upon him and wondering at his remarkable testimony.

In the arguments that followed, Mr. B referred to the witness in very uncomplimentary terms, calling him a "Jack in the Box," a "colossal prevaricator," and "confessed liar."

The testimony of the witness and what he was called by the attorney afforded as much town talk as the trial itself.

Some weeks after the case was over, I met the witness whom I knew well, and we engaged in a conversation. I wanted to learn something of his testimony as to his residence, but I was afraid to mention the subject, as I was under the impression, and believed it might be a delicate subject, having been talked of so much. I wanted to avoid offending him. I decided to gently lead the conversation up to the trial, and then if he did not volunteer any information, I would go a little further towards his testimony, so as to avoid offending him in any way. I decided to be very cautious and gentle to see what I could learn.

So when I reached the trial in our conversation I found the

information I desired was coming without any hesitation or evasion, frankly and openly.

Said he, "You know I was the subject of considerable talk and criticism in that trial, very much to my dislike and humiliation, and I have had to explain my testimony to many of my friends who did not understand it.

"I told the truth, I had no reason to do otherwise, it was just a simple misunderstanding. It is very clear when I explain it to you. I lived in house No. 19 and when I moved next door I carried my No. 19 with me, as I had placed it on the house, and I wanted my address to continue to be No. 19. The house in which I moved was No. 23, I took No. 23 off the house I was moving into and placed it on the house I left. Now this is my explanation, and it is very clear to anyone. I have had to make this same explanation to hundreds of my friends."

"Why did not you make this explanation on the witness stand?" said I.

"You know," said he, "How I dislike Mr. B, and I utterly despise him, I would not give him any explanation, I would not give him a single word if I could avoid it. I wanted to give him something to puzzle over. It was up to him to get this information from me.

"You know he went into a perfect rage over my testimony. I enjoyed seeing him become exasperated."

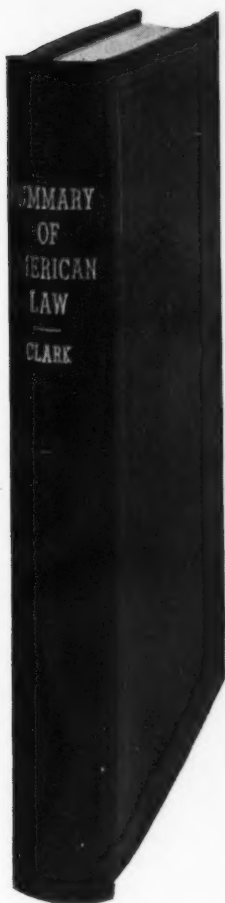
"I understand" said I, "that he made some very uncalled for remarks in this argument about you."

"Yes," said he, "I came near making a personal matter of this. I came near breaking the peace and laws of the State, but friends, my good friends, advised me to keep cool and let the

matter drop without resorting to personal violence. I am glad I took the advice of my good friends and let the matter drop as it would have been more trouble and maybe no end of trouble."

With this the witness and I parted better friends than ever.





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Motor Vehicle Cases— Preparation and Trial

Part of Legal Institute discussions on "Trial Practice" at the Kansas Bar Association meeting at Topeka, May 23-24, 1947

By

D. ARTHUR WALKER
of the Arkansas City, Kansas, Bar

Condensed from

The Journal of the Bar Association of
the State of Kansas, August, 1947

ONCE upon a time, I heard a man say that if you wanted to know how to make a million dollars not to ask a millionaire, but instead go to the poorhouse and ask the inmates what mistakes they had made that had prevented them from becoming rich. I expect I have lost more motor vehicle cases than almost any other lawyer in Kansas.

I feel that the preparation and trial of a motor vehicle case is but little different from the preparation and trial of any other case, that is to say, whether you win or lose depends in a large measure on the work you have done before commencing the actual trial of your case.

The lawyer who has personally viewed the scene of the accident, interviewed the witnesses, prepared his pleadings in a care-



ful manner, written a good trial brief on every question he can foresee which may arise, prepared a complete set of requested instruction, some appropriate special question to guide the jury in the right course in answering the special question asked by the insurance company which is defending the case, but you must not mention it, and has an outline of his opening statement to the jury, and the order of his proof, will prove a dangerous adversary to any opponent.

Upon being retained in a motor vehicle case, *first*, go to the scene of the accident and get a good picture in your own mind of the situation, get all the facts—every scrap of testimony that throws any light on the matter. Make an effort to get the statements of all the parties who saw

the collision or were involved in the matter, of the parties who saw the cars approaching the scene of the collision, of the parties who removed the wrecked cars, and made measurements and observed skid marks, get photographs, maps and plats of the location. You want the funeral bills, doctor bills, repair bills, and other items of damage.

While every lawyer has his own style of pleading, it seems proper to break a petition into three parts, i.e.: *first*, the allegation of the duty defendant owed the plaintiff; *second*, a breach of that duty; *third*, the injury, loss and damage received as the proximate result.

In your petition set out all the grounds of negligence you complain of. Nothing is more embarrassing than to have the jury find in your favor, and specify as the proximate cause an act of negligence you failed to set out in your pleading. You can guard against this by properly prepared special questions.

In pleading the personal injuries sustained, I have always felt that under Sections 60-704 and 60-736, General Statutes of Kansas 1935, one need not plead every ache, scratch and pain in order to be permitted to introduce evidence as to the same. Some courts, however, refuse to permit evidence of any ill effects not specifically set out.

In Kansas it seems to be the rule that if the after effects of an injury are the *natural* and

probable results they need not be specially alleged. In some *unusual, unnatural or extraordinary* result should follow, then such should be pleaded. But always plead as many as you think you can sustain by any evidence.

To you lawyers who want to scare some plaintiff's attorney out of his boots, let me make a suggestion as to a different strategy to try once in a while. As soon as your client is sued and before the return date of the summons, file your answer and you will probably find the opposing counsel is not ready for trial and worried because you appear so anxious to get to trial.

And now a suggestion—once a case is filed, whether you be attorney for plaintiff or defendant—don't delay it—get it ready for trial and *try it*. There is neither riches nor glory in dormant files.

Someday, your case will be at issue and ready to be assigned for trial. If you have anything to say about its position on the calendar have your case set for the third or fourth case to be tried. Juries, after hearing and considering two or three cases, become "court wise," better able to properly evaluate evidence and to understand correctly how to apply the instructions of the court, and you will learn a little about some jurors you do not want on your case. Jurors in the preceding cases will talk and tell about the prejudices of other

jurors, and what a blockhead or stubborn ass juror Jones is.

When possible get your case assigned for a Monday, the jurors will be rested and more attentive, you will have a Saturday and Sunday to check over your files for a last minute refresher, you will frequently avoid a weekend adjournment and a break in the continuity of your case.

Assuming your case is set for a Monday, try and get all of your witnesses together about the preceding Friday. There are several advantages to getting all of your witnesses together at one time. It saves time and clears up confusion in dates, names, etc. Several months after an accident, one of your witnesses is sure the accident was on a Tuesday. In the group is a witness who reminds him they were at a public sale on Tuesday, and bought some hay and were going after the hay the next day when they came to the scene of the accident. Thus reminded, he recalls it was Wednesday he saw the wreck.

Another witness was sure the defendant was driving a Buick instead of a Pontiac. His attention is called to the fact the hood was raised from the side, like a Pontiac and unlike a Buick, and he is satisfied he was mistaken about the make of the car. It all serves to refresh their recollection.

Tell your witnesses to be courteous, not to be flippant, to frankly tell with whom they

have discussed the case, including yourself, to give short, concise, direct and unevasive answers to questions.

Furthermore, tell your witnesses it is no reflection on their intelligence to answer "I don't know," when interrogated concerning some fact of which they have no knowledge. Some witnesses seem to feel they must give some kind of an answer to every question, and once a witness starts "guessing" the whole value of his testimony is weakened, if not destroyed. Of course, this can be overdone. I recall an instance where a former assistant attorney general of the state of Kansas, and now counsel for a large public utility concern, had evidently cautioned his witness to reply to most questions as follows: "I don't know, that is not in my department." Somewhat to his surprise when he put one of his own witnesses on the stand and upon direct examination asked him to state his name, the witness replied, "I'm sorry, sir, I don't know, that's not in my department."

Assuming you have interviewed your witnesses and know the extent of your proof, it is well to consider the order in which you will put it on. If you have had a chart, plat or map made of the location, it would be well to put it on first. Get the location and fixed monuments clearly in the minds of the jurors. Follow that by a witness or witnesses who can describe

the intersection, the road, the culverts and bridges, the fences, the trees and other features that will aid the court and jury in visualizing the situation. Follow this with witnesses who can describe the collision, the location and condition of the cars, the speed of the cars before entering the intersection. Then, you should show the appointment of the administrator, if there be one, the life expectancy of all the parties, the doctor and hospital bills, and the funeral expenses.

If you represent the defendant give attention to the order in which you intend to put on your proof. If you have only two good witnesses and several mediocre ones, open your case with a good witness, fill in with your poor ones, and close with a good witness. If you have several depositions to read, do not read one deposition after another, but put on a living witness between depositions to keep alive the interest of the jury.

In reading a deposition, the practice of having one attorney read the questions and counsel in the witness chair read the answers is to be recommended. It aids in adding emphasis to the answers of the witness and avoids confusion between what was in the question asked and answer given.

Finally, your case is called for trial. The public believes your work starts and ends in the courtroom—every lawyer real-

izes this is an erroneous idea—as mistaken as the idea that all a farmer does is to gather his corn or harvest his grain and that he will have a prosperous crop regardless of how he prepared his soil, how and when he planted his seed, and the care and attention he gave his growing crop.

Volumes have been written about the selection of a jury, and time will not permit a treatise on that subject. However, it is believed that in so far as possible the selection of jurors as near the same age, occupation, and station in life as your client is desirable. The juror who is a banker understands the trials and tribulations of one who loans money to a person who believes the signing of a note is a final extinguishment of all liability. A juror who works as a truck driver will ordinarily be sympathetic to a truck driver litigant who is charged with the negligent operation of his truck.

After the selection of the jury comes the opening statements of the parties. By all means, make a good, fair, intelligent opening statement. A good statement will help both the court and jury to understand your case and the significance and materiality of evidence you will want to introduce later. Be fair in your statement. Exaggerated claims not followed by evidence will react against you. Give your statement in a manner it can be easily understood. Time spent in arranging your facts and

dates to make a good opening statement will be time well spent.

AND NOW A FEW DO'S AND DON'TS.

DO be courteous to court and opposing counsel.

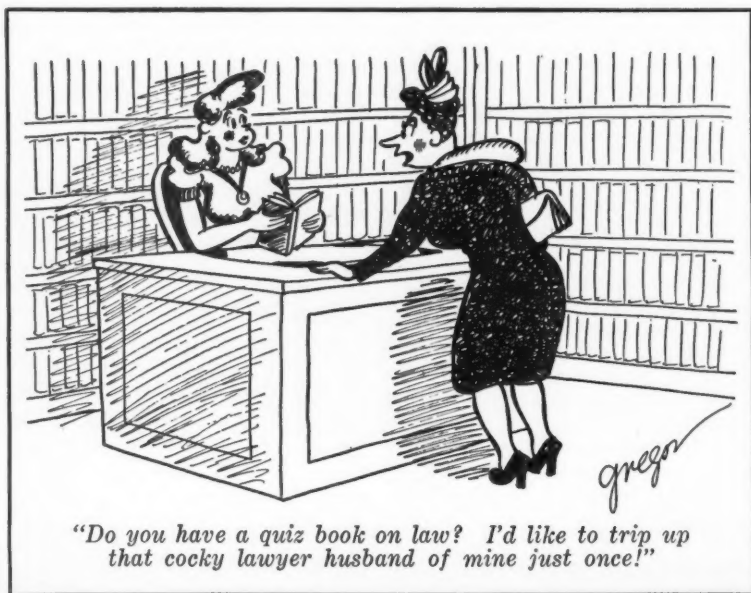
DO be willing to stipulate on all matters that the other party can prove if you want to make them go to extra trouble. If the other party starts to introduce a doctor bill, X-ray bill, hospital bill, etc., and you know the bill is legitimate and reasonable, you gain nothing by insisting they bring in the parties who did the

work or made the records to properly identify them.

DO have your requested instructions prepared for submission to the court and opposing counsel before all the evidence is introduced.

DO cite at the end of each requested instruction or on an attached sheet, the decisions you feel justify or approve your requested instruction.

DON'T try to impress the court and jury with your superior knowledge. The manifestation of too much brilliance is a liability—we all are a bit sympathetic to the underdog.



"Do you have a quiz book on law? I'd like to trip up that cocky lawyer husband of mine just once!"

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DON'T make an objection just because the objection is good and will likely be sustained.

DON'T object to a question unless: (a) The question is improper; and (b) *The anticipated answer is going to hurt your cause.* One of the easiest ways to lose a lawsuit is to fill the record with objections and create the impression you are trying to keep from the jury all the facts, or doubt their intelligence to understand the evidence, if admitted.

DON'T use toy automobiles. They look pretty on the floor, but on an appeal with a record reading, "This car was here and he was there and then this car turned this way and hit this one here," the higher court is at a loss to accurately learn just what occurred.

DO use a big chart where witnesses can mark out locations of cars, distances, skid marks and data for the record, make it big enough so the jury can see it and mentally refer to it all during the trial.

If you are representing the plaintiff, refer to the automobiles striking each other as a "collision." If you are representing the defendant, refer to the occurrence as an "accident," and hope the frequent repetition of the word "accident" may help the jury find the entire occurrence was an "unavoidable accident" and hence the defendant is not responsible.

In the trial of a case remember the court and jury may consider as evidence what they gain from three sources: (a) Testimony of witnesses; (b) Documentary evidence such as photographs, deeds, maps, contracts, etc.; and (c) Inspection of objects or premises.

On many of the controverted issues in a motor vehicle accident case, you will find it is proper and desirable to put your evidence in by using all three methods. For example, a witness may testify how the grill work on the car was bent and twisted, photographs of the damage may be introduced of the grill work while attached to the car, and the grill work itself may be introduced for inspection of the court and jury.

It may be assumed the more ways and methods the trier of facts acquires information, the greater the opportunity of establishing the fact. The testimony we *hear* requires the exercise of our auditory senses, the documents we *see* calls into operation our visual senses, the broken grill work we lift, feel and inspect calls into operation our sense of touch. Some people are most strongly impressed by what they see, others by what they hear, others by what they feel, inspect and examine, so do not overlook using all the various methods of introducing evidence where proper.



Among the New Decisions

Adoption — *residence of infant for purpose of.* Adoption proceedings are now more numerous than ever before. The decision in *Re Duren*, — Mo —, 170 ALR 391, 200 SW2d 343, opinion by Judge Ellison, holds that the conditional disposition of an eight-year-old child by the last surviving parent, made while in ill health and within three months of his death, by placing the child in a home of the parent's choice with the intent that in the event of his death the child should reside permanently in the home selected, fixes the residence of the child within the meaning of the adoption statute conferring jurisdiction in adoption proceedings upon the court of the county of the residence of the child, even though there was no complete abandonment of the child by the parent.

An interesting annotation on "What constitutes residence or domicil of child or adopting parents for purposes of jurisdic-

tion of adoption proceedings" appears in 170 ALR 403.

Alimony — *decree directing payment to trustee.* The California Court in *Bowman v. Bowman*, 29 Cal2d (Adv 819), 170 ALR 246, 178 P2d 751, opinion by Justice Traynor, held that though payments by a husband for the support of his divorced wife and their child normally should be paid directly to the wife, a decree may permissibly require the payment to the court trustee of money to be applied to the discharge of indebtedness on which both husband and wife are liable.

The subject of the annotation in 170 ALR 253 is "Directing payment of alimony to trustee."

Automobiles — *condition of brakes.* Brakes are an important consideration in automobile accident cases. The Washington Court held in *McCoy v. Courtney*, 25 Wash2d 956, 170 ALR 603, 172 P2d 596, opinion by Judge Steinert, that the

violation of a statute imposing a positive duty upon the owner of an automobile to have it equipped with brakes capable of holding the vehicle on any plus or minus grade upon which it is to be operated constitutes negligence per se.

All lawyers who try automobile damage cases will make the reading of the extensive annotation in 170 ALR 611 a must. Its title is "Effect of defective brakes on liability for injury."

Bankruptcy — judgment on nondischargeable claim. The Connecticut Supreme Court in *Fidelity & Casualty Co. v. Golombosky*, 133 Conn 317, 170 ALR 361, 50 A2d 817, opinion by Chief Justice Maltbie, held that the rendition of a judgment based upon a note does not preclude proof by evidence extraneous to the record, in reply to a defense of discharge in bankruptcy, that the underlying debt was within the exception from the operation of the discharge made by § 17 of the Bankruptcy Act.

The annotation in 170 ALR 368 discusses "Character of original claim as nondischargeable as preventing discharge in bankruptcy of judgment on note given therefor."

Bankruptcy — renunciation of property passing by descent. A scheme to defeat creditors found little sanction in *Bostian v. Milens*, — Mo App —, 170

ALR 424, 193 SW2d 797, opinion by Judge Bland. It was there held that a trustee in bankruptcy of an heir of one dying intestate becomes vested, at the time of the filing of the bankruptcy petition, with the equitable title to the bankrupt's interest in the decedent's estate, subject to the payment of the decedent's debts and the expenses of the administration of the estate, notwithstanding an attempt by the bankrupt to renounce or disclaim his interest as heir, made within three months before the filing of the petition in bankruptcy.

In 170 ALR 435 the question "Renunciation of benefit under statute of descent and distribution" is discussed.

Bills and Notes — transfer of overdue instalment note. In *Bliss v. California Co-operative Producers*, 30 Cal2d (Adv 237), 170 ALR 1009, 181 P2d 369, opinion by Judge Carter, it was held that the transferee of an instalment note cannot be a holder in due course as to that portion of the note represented by instalments which are overdue at the time of the transfer to him.

The annotation in 170 ALR 1029 discusses "Maturity of one or more of instalments of note payable in instalments as affecting status of purchaser as holder in due course."

Cloud on Title — intervention of third party. Title disputes

are sometimes three sided. The North Carolina Court in *Moore v. Massengill*, — NC —, 170 ALR 147, 41 SE2d 655, opinion by Judge Denny, held that a third party who claims title to the premises involved in an action to remove a cloud upon title but who is not relying upon any source of title sought to be established in the action will not be permitted to interplead and have his independent claim of title adjudicated therein.

The annotation in 170 ALR 149 shows under what circumstances third parties may intervene in title suits.

Confession — voluntariness of. The province of court and jury in the matter of confessions was presented in *State v. Crank*, 105 Utah 332, 170 ALR 542, 142 P2d 178, opinion by Judge Larson. The case holds that the question of voluntariness or involuntariness of a confession must be determined by the court from all the evidence from both sides bearing thereon; if the court is satisfied from the evidence that the confession was voluntary, the confession is to be admitted in evidence to the jury together with all of the evidence on the question whether it was voluntary and the circumstances surrounding its being made, and from such evidence the jury must determine the weight and credibility to be given it, but may not determine its competency as evidence, that being a question for the court.

Supplementing an earlier annotation in the series, cases from all jurisdictions are collected in 170 ALR 567.

Constitutional Law — inheritance rights of aliens. An interesting constitutional question decided by the U. S. Supreme Court, in *Clark v. Allen*, — US —, 91 L ed (Adv 1285), 170 ALR 953, 67 S Ct 1431, opinion by Justice Douglas, holds that a state statute which makes the right of nonresident aliens to take by succession or testamentary disposition dependent upon the existence of a reciprocal right on the part of citizens of the United States to take personalty on the same terms and conditions as residents and citizens of the other nation is not, in the absence of a treaty covering the rights of succession, unconstitutional as an extension of state power into the field of foreign affairs which is exclusively reserved by the Constitution to the Federal government.

See the annotation in 170 ALR 966 on "Constitutionality, construction, and application of provision of state statute that makes right of alien to succeed to property of deceased person dependent upon a reciprocal right in United States citizens."

Contracts — part performance recovery for upon destruction of the subject matter. The Connecticut Supreme Court in *Automobile Insurance Co. v. Model Family Laundries*, 133 Conn

433, 170 ALR 975, 52 A2d 137, opinion by Chief Justice Maltbie, holds that the basis of recovery by one who has partially performed a contract before the destruction of the subject matter of the contract without fault on his own part rendering further performance impossible, is the value of the part performance, meaning thereby the benefit derived from the performance in advancing the objects of the contract, not exceeding the ratable portion of the contract price.

The annotation in 170 ALR 980 discusses "Basis of recovery

for partial performance of contract, full performance of which is prevented by destruction of subject matter."

Declaratory Judgment — custody of child. A novel question was presented in *Carter v. Nance*, 304 Ky 256, 170 ALR 517, 200 SW2d 457, opinion by Judge Sims. It was held that the question whether the father of a minor child whose mother is dead or the maternal grandparents of the child are entitled to its custody is a controversy which may properly be decided



"As medical expert would you kindly give the court your opinion!"

in a declaratory judgment action.

See the annotation in 170 ALR 521 on "Custody of child as proper subject of declaratory action."

Declaratory Judgment — labor dispute. The question of the right to a declaratory judgment in a labor dispute was presented in *New York Post Corp. v. Kelley*, 296 NY 178, 170 ALR 407, 71 NE2d 456, opinion by Judge Conway. The case holds that newspaper publishers selling their newspapers to licensed news dealers who in turn resold the papers to the public for a profit, and who previously, in an action by the attorney general to enjoin picketing of certain news dealers, had been judicially determined not to be employees of the newspapers but independent retail merchants, may bring an action for a declaratory judgment seeking an adjudication that the New York Labor Relations Act (Labor Laws, c. 31, §§ 700 et seq) does not apply to give the State Labor Relations Board jurisdiction of a controversy between rival local news dealers' unions belonging to the same parent organization, each claiming to be the representative of, and entitled to be certified as the collective bargaining agent of certain licensed newspaper dealers on the ground that there existed no relationship of employer and employee between the publishers and the news

dealers, and further that since the two unions were affiliated with the same parent organization a jurisdictional dispute was presented depriving the board of power to act.

The annotation in 170 ALR 421 discusses "Labor dispute as proper subject of declaratory action."

Descent and Distribution — inheritance by widow of adoptive father. It was held in *Re Frazier*, — Or —, 170 ALR 729, 177 P2d 254, opinion by Judge Lusk, that the widow of a deceased adoptive father, who married him after the death of the adoptive mother and who has not adopted the child, is not entitled to inherit from the child upon his death intestate, unmarried, and without issue, under a statute providing that an adopted child shall be deemed, for the purposes of inheritance of such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them by lawful wedlock.

See the supplemental annotation in 170 ALR 742 on the subject "Descent and distribution of property of adopted child."

Divorce — recrimination. In *Stewart v. Stewart*, — Fla —, 170 ALR 1073, 29 So2d 247, a per curiam opinion holds that the doctrine of recrimination in divorce cases is not an absolute

but a qualifying doctrine, and is not to be applied where great inequity would be done.

The annotation in 170 ALR 1076 discusses "Recrimination as an absolute or qualified defense in divorce cases."

Divorce and Separation — *corespondent's right to intervene.* The corespondent in a divorce suit has little legal protection. The Maryland Court, in *Lickle v. Boone*, — Md —, 170 ALR 156, 51 A2d 162, opinion by Judge Delaplaine, held that in the absence of statutory authorization, one named as corespondent in a divorce suit has no right to intervene as a party to the suit either in order to protect his reputation or on the theory that he may protect the rights of the public.

The annotation in 170 ALR 161 discusses "Right of corespondent to intervene in suit for divorce."

Eminent Domain — mortgage foreclosure as affecting compensation for. Judge Stephens, of the Circuit Court of Appeals, held in *Swanson v. United States*, 170 ALR 258, 156 F2d 442, that in a state in which a mortgage only creates a lien upon the mortgaged land and a foreclosure sale looking to the satisfaction of the mortgage creates no greater interest in the foreclosure sale purchaser during the period allowed by statute within which the mortgagor

may redeem, when eminent domain proceedings to acquire title to a part of mortgaged land are brought after a foreclosure sale at which the property was bid in by the mortgagee, but during the redemption period allowed by law to the mortgagor, the mortgagee-purchaser or his assignee does not become entitled to the entire amount of the compensation awarded for the part of the land taken, plus the non-condemned portion, notwithstanding the failure of the mortgagor to exercise his right to redeem, unless both are necessary to satisfy the mortgage debt.

The annotation in 170 ALR 272 discusses "Rights in respect of proceeds of an award in eminent domain proceedings made after mortgage foreclosure sale."

Evidence — other criminal acts. A criminal evidence problem was presented in *State v. Rand*, — Iowa —, 170 ALR 289, 25 NW2d 800, opinion by Judge Bliss. It was there held that in a prosecution for keeping a gambling house based on the defendant's alleged operation of a night club which was operated as an eating house, a tavern for the sale of beer and liquor, and as a gambling house, all under the same management and in the same building so that patrons could patronize all the departments, evidence as to sales of liquor at the night club, the seizure of bottles found beneath

and behind the bars in the gambling rooms, along with gambling devices in the raid on the club, and the identity of contents of the bottles as whisky, has material evidential and probative value on the issues as to the defendant's relation to the place and his connection with its operations, and is admissible notwithstanding the general rule excluding evidence of other criminal acts of the defendant in a criminal prosecution, where there is evidence that the defendant's employees served customers with liquor, and that the defendant was active in and about the place, and behind the bar and in the gambling room where liquor was sold.

A valuable comment note on "Admissibility in criminal case of evidence relevant to the crime charged, as affected by incidental disclosure of another crime by defendant" appears in 170 ALR 306.

Evidence—repairs after accident. Every lawyer has been troubled by the problem posed in *Kentucky & W. V. Power Co. v. Stacy*, 291 Ky 325, 170 ALR 1, 164 SW2d 537, opinion by C. Van Sant, where it was held that the admission, in an action for personal injuries involving question of fact whether gas from a well had found its way into a building, of evidence that after an explosion defendant put in a pipe up to the top of the building so as to "lead off" the

gas if there was any in the well is prejudicial and reversible error.

Every lawyer will welcome the annotation "Admissibility of evidence of repairs, change of conditions, or precautions taken after accident." 170 ALR 7.

Income Taxes — family transaction. The U. S. Supreme Court in *McWilliams v. Commissioner*, — US —, 91 L ed (Adv 1383), 170 ALR 341, 67 S Ct —, opinion by Chief Justice Vinson, held that the prohibition by § 24 (b) of the Internal Revenue Code of deductions in ascertaining taxable income for losses from "sales or exchanges of property, directly or indirectly . . . between members of a family," include cases of a sale on the stock exchange by one member of a family where another member of the family simultaneously purchased on the exchange the same number of shares of the same stock, even though the identity of the persons with whom they deal is unknown and the certificates received by the purchaser are other than those sold.

The annotation in 170 ALR 347 discusses "Income tax: sales through public exchange or broker as within provision against deduction in respect of losses from sales or exchanges of property, directly or indirectly, between members of a family, or persons in trust relationship or in other relationship contemplated by such a provision."

Income Taxes — life insurance proceeds. An important income tax question was decided in *Law v. Rothensies*, 170 ALR 310, 155 F2d 13, opinion by Judge McLaughlin. It was there held that under § 22 (b) (1) of the Internal Revenue Act of 1938 which excludes from gross income and exempts from Federal income taxes amounts received under life insurance policies by reason of the death of the insured, whether in a single sum or otherwise, but provides that if proceeds of life insurance are held by the insurer under an agreement to pay interest thereon the interest shall be included in gross income, construed in the light of its legislative history, no part of the amount of instalment payments of the proceeds of a life insurance policy made to the beneficiary pursuant to her election to receive payment in annual instalments in accordance with tables set out in the policy, may be included as a part of the gross income of the beneficiary for tax purposes, although the amount of each instalment payment is in excess of the aliquot part of the proceeds of the policy.

The annotation "Construction and application of provision of income tax statute regarding exclusion from gross income of proceeds of life insurance received on death of insured," 170 ALR 315, supplements earlier discussion of the question.

Labor — checkoff of union dues from earnings of municipal employees. Public employee's right to join unions is one of the important questions of our time. The Ohio Court in *Hagerman v. Dayton*, 147 Ohio St 313, 170 ALR 199, 71 NE2d 246, opinion by Judge Turner, held that a municipal ordinance providing for a checkoff of union dues from wages or salaries of municipal civil service employees and directing the municipal finance director, when authorized in writing by the employees, to make such checkoffs, is an exercise of the police power within the meaning of article 18, §§ 3, 7, limiting the power of home-rule municipalities to adopt police powers conflicting with general laws, and is invalid as in conflict with § 6346-13 Ohio General Code providing that no wage assignments except those specifically exempted shall be valid.

The annotation in 170 ALR 214 discusses "Power of municipality or other governmental body to authorize 'checkoff' of labor organization dues from the salary or wages of employee or officer."

Lease — additional condition as acceptance of offer. An elementary principle of the law of contracts was applied in *Polhamus v. Roberts*, 50 NM 236, 170 ALR 991, 175 P2d 196, opinion by Judge Brice. It was there held that a reply to an offer to

lease premises, purporting to accept the terms of the offer but adding the condition that a written lease be made to third persons to whom the offeree is assigning his lease rights, which departure from the terms of the offer is not a mere request of a favor, to be complied with or not at the offeror's option, but is a condition of the acceptance, is not an acceptance of the offer, and gives rise to no contract.

The annotation in 170 ALR 996 discusses "Acceptance of offer of contract predicated upon reply which contemplates third person as party to the contract."

Lease — construction of percentage lease. In *Garden Suburbs Golf & Country Club v. Pruitt*, 156 Fla 825, 170 ALR 1107, 24 So2d 898, opinion by Judge Sebring, it was held that a provision of a long-term lease of a resort hotel fixing rentals on the basis of stipulated percentages of the gross receipts of any business conducted by the tenant on the premises, giving the tenant the right to sublet portions of the premises or concessions or privileges therein, has reference only to ordinary minor concession features of a hotel of the type involved, such as the



barber shop, flower shop, cigar stand, news stand and the like, and does not enable the tenant, by subletting the main revenue-producing facilities customarily operated and managed by the proprietor of such a hotel, to deprive the landlord of the stipulated percentages of receipts from their operation.

In view of the increasing number of these percentage leases the annotation in 170 ALR 1113 is extremely valuable.

Lease — option to purchase as extending to larger tract. An interesting question was presented in *Atlantic Refining Co. v. Wyoming National Bank*, 356 Pa 226, 170 ALR 1060, 51 A2d 719, opinion by Judge Jones. It was there held that a provision of a lease of a portion of a parcel of land giving the lessee a preferential right to purchase "the demised premises" on the terms of an acceptable offer to purchase made by a third person to the lessor, gives the lessee no right to purchase the whole parcel for which a third person has made an offer.

The annotation in 170 ALR 1068 discusses "Lessee's option to purchase as affected by lessor's receipt of offer for, or sale of, larger tract which includes the leased parcel."

Life Tenants — rights of remaindermen in consumable property. Life tenants do not always agree with the remain-

dermen. The Massachusetts Court in *Nelligan v. Long*, — Mass —, 170 ALR 126, 70 NE2d 175, opinion by Judge Dolan, decided that the entire net income derived from the operation of a quarrying and stone-crushing business by a testamentary trustee, on land devised to a trustee, who, by the express terms of the trust, is directed to carry on the business so long as it shows a reasonable amount of profit on the investment, may properly be paid to those entitled to income from the trust estate without making any provision in favor of the remainderman for amortization of depletion of the wasting assets of the trust by the continued operation of the business.

Supplementing an earlier annotation in the series, the annotation in 170 ALR 133 discusses "Rights as between the life tenant and remaindermen in respect of property, estates, or securities of a wasting, consumable, or perishable nature."

Lost Money — rights of finder. "Finders are keepers" is not always true in law. The Minnesota Court holds in *Erickson v. Sinykin*, — Minn —, 170 ALR 697, 26 NW2d 172, opinion by Judge Olson, that the finder's qualified possession of a roll of paper money which he found concealed under the rug of a hotel room that he was redecorating, and his dominion over the money, is a valid basis for

the maintenance of an action to recover possession of the money against the hotel owner to whom the finder had delivered the money upon the representation by the hotel owner that he knew the true owner and would deliver the money to him.

A valuable annotation in 170 ALR 706 discusses "Rights in respect of lost, mislaid, or abandoned property as between finder and person upon whose property it is found."

Mortgages — compensation for services of mortgagee in possession upon redemption. A mortgagee who takes possession during the period of redemption may render services in the care of the property at his peril. The Oregon Court in *Murray v. Wiley*, — Or —, 170 ALR 169, 176 P2d 243, opinion by Judge Brand, held that mortgagees in possession of mortgaged premises are not entitled, in a proceeding by the mortgagor to redeem from the mortgage, to an allowance of reasonable compensation for services rendered by one of the mortgagees, a dealer in real estate and insurance, in attending to repairs, the collection of rentals, and the keeping of books and the management of the mortgaged building, where there is no claim that he rendered any unusual service in connection with the management of the property.

There are two views on the question. They are discussed in

the annotation in 170 ALR 181 "Right of mortgagee in possession to compensation or credit for supervision or other services."

Part Payment — made in violation of a Sunday statute. An interesting decision by the Massachusetts Court in *Ryan v. Gilbert*, — Mass —, 170 ALR 241, 71 NE2d 219, opinion by Judge Qua, holds that a part payment upon a written agreement for the sale of corporate stock, invalid because executed on Sunday, in violation of a statute, does not constitute a part payment sufficient to take out of the statute of frauds an oral agreement subsequently made for the sale of the stock.

The annotation in 170 ALR 245 discusses "Money or other property in possession of seller, before contract was made, as satisfying condition of part payment which will take oral contract for sale of goods out of statute of frauds."

Perpetuities — partial invalidity. It was held in *Porter v. Baynard*, — Fla —, 170 ALR 747, 28 So2d 890, opinion by Chief Justice Chapman, that under a devise of property in trust for the creation of a memorial fund in perpetuity in memory of the testator's husband and brothers which provided that one half of the income from the trust fund be added annually to the corpus of the fund and that the other half of the income from the fund

be used for annual donations distributed among designated charities, the financial provisions of the memorial fund and the charitable bequests are so dependent upon and intermingled with each other as to be inseparable so that the illegality of the memorial fund under the rule against perpetuities renders void the bequests for charity.

The annotation in 170 ALR 760 discusses "Gift to charity as affected by conjoined noncharitable gift invalid under rule or statute against perpetuities or rule against accumulations."

Proxy Marriage — validity. Contrary to general belief some "proxy marriages" are good. The Ohio Court of Common Pleas, held in *Respole v. Respole*, 34 Ohio Ops 1, 170 ALR 942, 70 NE2d 465, opinion by Judge Witten, that a proxy marriage which is valid and legal in the jurisdiction where it was performed will be recognized as a valid and legal marriage in another state, although such marriages are not authorized in the latter state.

The annotation in 170 ALR 947 discusses "Proxy marriages."

Replevin — duty to return property. In times of shortages property is more desirable than money. Hence in *Barstow v. Wolff*, — Neb —, 170 ALR 118, 26 NW2d 390, opinion by Judge Carter, it was held that an alter-

native judgment for the defendant in a replevin action adjudging the defendant to be entitled to possession of the property, and, in case it cannot be returned, that he have judgment for the sum fixed as its value, requires the plaintiff, who has replevied the property, to return it to the defendant, and he cannot elect to keep the property and pay the value thereof.

The annotation on page 122 discusses "Alternative judgment in replevin as giving option to either party in regard to payment of damages or return of property."

Restitution — use of inventor's idea. A very interesting question involving the rights of an inventor was decided in *Matarese v. Moore-McCormack Lines*, 170 ALR 440, 158 F2d 631, opinion by Judge Clark. It was there held that the doctrine of unjust enrichment may be invoked by an employee seeking recovery for the value of the use of his inventive ideas disclosed to and utilized by his employer, where the evidence discloses that the plaintiff, a man of little education employed as part-time stevedore, informed the defendant's stevedore superintendent that he had devised a means of facilitating loading and unloading of cargo, and the superintendent, after a demonstration of models by the plaintiff, promised the plaintiff, although without actual authority in this

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regard, that he would be compensated for the use of his idea out of savings resulting to the defendant, offering the plaintiff the job of supervising construction of the devices for the defendant, which the plaintiff accepted; that after a full-scale test of the devices on the defendant's pier in the presence of the superintendent and officials of the defendant, the plaintiff was given full-time employment and directed to go ahead with the manufacture of the devices with materials furnished by the defendant, a number of which were put in use at piers operated by the defendant, with the result that the defendant was enabled to make large annual savings in cost of operations; that when the plaintiff, from time to time, inquired about his money, he was always assured by the superintendent, who in the meantime had been promoted to an executive position sufficiently high to justify his accepting benefits of more efficient stevedoring, that compensation would be made in the future, but that five years after the disclosure of the device, and three years after he had been issued a patent therefor, the plaintiff was discharged from the defendant's employment without receiving any payment for his claim.

An extensive comment note on "Rights and remedies (independently of patent laws) of one who makes an invention or dis-

covery, or conceives an idea or plan, as against one who utilizes it industrially or commercially, or discloses it, or threatens to do so" appears in 170 ALR 449.

Sales Agency — effect of partnership dissolution. In drafting sales agency agreements where a partnership is involved a provision as to the effect of the death of one of the partners should be incorporated. The Minnesota Court in *Egner v. States Realty Co.*, — Minn —, 170 ALR 500, 26 NW2d 464, opinion by Judge Peterson, holds that under a contract conferring upon partners an exclusive agency for the sale of cemetery lots, which on its face shows that the members of the partnership were employed because they were experienced cemetery lot salesmen and that it was expected to realize upon the combined sales ability of both in promoting sales of lots, when one of the partners withdraws from the partnership firm, the other partner does not succeed to the rights of the partnership in the agency contract, in the absence of some further contractual provision in the contract compelling a contrary conclusion.

See the annotation in 170 ALR 512 on "Agency conferred upon partners as affected by dissolution of the partnership."

Trusts — third person participating in investment of funds. Third parties may be liable for

the improper investment of trust funds. It was so held in *Sontag v. Stix*, — Mo —, 170 ALR 349, 199 SW2d 371, opinion by Judge Clark. The holding is to the effect that a broker who as agent for, and at the direction of, the guardian of the estate of an incompetent ward purchases with the funds of the ward securities which were not legal investments for trust funds, but without actual knowledge of the guardian's lack of authority to invest in such securities, is not liable to the guardian for the loss resulting when the securities became worthless where, although the broker knew that the guardian was using his ward's funds to purchase the securities, and that he was restricted in his powers to make investments, he also knew that the guardian was represented by an attorney at the time, through whom he had procured an order of the probate court authorizing the purchase of the securities in question.

See the annotation in 170 ALR 358 supplementing an earlier annotation in the series.

Wills — avoidance of statute for benefit of after-born chil-

dren. A just decision appears in the case of *Hedlund v. Miner*, 395 Ill 217, 170 ALR 1306, 69 NE2d 862, opinion by Judge Thompson. It is there held that intention of a testator to disinherit a child born after the execution of a will, within the meaning of a statute providing for after-born children not mentioned in the will "unless it appears by the will that it was the intention of the testator to disinherit the child," is not indicated by the facts that the testator at a time when he had no children, but when he was anticipating early birth of a child to his pregnant wife, for whose welfare he was solicitous, executed a will bequeathing and devising all of his property to his wife absolutely, making her sole executrix, without making any mention of the expected child, and that some two weeks after the child was born he delivered the will to the wife.

The annotation in 170 ALR 1317 discusses "What, other than express disinheritance or bequest, avoids application of statute for benefit of pretermitted or after-born children."

Nothing but the Truth

This chap was before the Sugar Rationing Board. "My wife has no sugar at all in our house—not an ounce!" The Chairman of the Board warned him, "Remember you are swearing to this. You must tell the truth or you'll go to jail." The chap thought for a moment, "Gotta tell the truth, eh? In that case rather than do a stretch in jail I'll tell you. We ain't married!"

—*Cosgrove's*.

WHY HONEST PEOPLE STEAL

By VIRGIL W. PETERSON

Condensed from The Journal of Criminal
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IT HAS been estimated that annual losses resulting from the offense of embezzlement will approximate the astronomical sum of \$400,000,000. A large share of this amount is taken by trusted employees who have previously enjoyed excellent reputations.

The embezzler is an anomaly in the field of crime. Previous arrest or prison records are frequently wanting to act as warnings of possible dishonest conduct. Steady work records many times conceal the instability that may be present in the person's make-up. Yet, there is usually an explanation for the embez-

zler's conduct. And through an understanding by employers of some of the factors that frequently contribute to embezzlement, it is believed that business losses as well as the crime of embezzlement can be materially reduced.

In view of the frequency of embezzlement cases involving losses of large sums of money, an attempt has been made to determine some of the factors that contribute directly or indirectly to the offense of embezzlement. In this connection it was felt that surety companies are the best source of accurate information in view of their long and intimate experience with this problem. Surety companies in every part of the United States were requested to rank in order of their importance those factors that appear to cause employees to embezzle or steal from their employers. Replies were received from over twenty approved surety companies and fidelity bond departments of insurance companies located in various parts of the United States.

Mr. Peterson is Operating Director of the Chicago Crime Commission, a position he has held since 1942. For twelve years prior to that time he was with the Federal Bureau of Investigation, in which he served as Special Agent in charge of the FBI offices at Milwaukee, St. Louis and Boston. Mr. Peterson is a member of the Illinois Bar and a graduate of Northwestern University School of Law. He received his A.B. from Parsons College, which awarded him an LL.D in 1946.

Gambling

Based on the experience of over twenty of the largest surety companies, it would appear that the two principal factors contributing to employee dishonesty are gambling and extravagant living standards. Some companies estimated that gambling on the part of employees has been responsible for 30% of the losses of those companies. Other companies blamed gambling for as high as 75% of their total losses.

One surety company stated that "Gambling losses in large amounts are more frequent now than ten years ago." This is the natural consequence of the growth of gambling in America during the last decade. The upward surge of gambling since World War II ended undoubtedly adds to the hazard of embezzlement in business today.

Extravagant Living Standards

Some surety companies attribute more of their losses to extravagant living standards than to any other single cause. Inquiry into the causes for defalcation on the part of many employees has determined that the embezzler was living beyond his financial means. He stole to supply the necessary income to maintain his mode of living.

The necessity for maintaining living standards that he cannot afford does not always originate with the embezzler himself. His wife may make extravagant de-

mands. Attempting to "keep up with the Joneses" has frequently caused trusted employees to borrow funds entrusted in their care. They may fully intend to pay back the money taken but are never able to do so.

Careless spending habits are very similar to extravagant living standards as a cause of embezzlement. Such habits may result from poor management or through exercising bad judgment in personal or family affairs rather than from attempting to live extravagantly. The results are often the same. Many embezzlements have their origin in careless spending habits of employees.

Unusual Family Expense

Perhaps the most pathetic cases are those of employees who steal to meet some unusual family expense that may have suddenly arisen. One surety company reported the case of an employee who had a very sick wife. All of his savings had been exhausted to pay for medical services. She required further medical care. So great was the desire of the employee for his wife to regain her health that he insisted on providing her with the best available medical aid. He could not afford this unusual expense. The strain upset him emotionally and he stole from his employer. Such cases are not unusual. Several companies listed illness of a member of the family as one of the im-

portant causes of employee dishonesty.

Undesirable Associates

Frequently the cause of embezzlement may be traced to undesirable associates. It was stated by some surety companies that the two most frequent causes of embezzlement are (1) slow horses, and (2) fast women. Not infrequently the "other woman" figures in embezzlement cases. Employee dishonesty is also many times attributed to association with companions who drink heavily and who run with a fast crowd. The expenditures necessary to maintain himself in this company may be considerably beyond the income of the employee. The bad influence of his association and the development of habits of carousing may result in a general breakdown of moral standards. Stealing from his employer may follow.

Inadequate Income

In many criminal court cases the defense is presented on behalf of the embezzler that his income was inadequate to support his family and consequently he was driven to stealing. It is undoubtedly true that inadequate salaries have frequently contributed to employee dishonesty. The employee, to his partial satisfaction, is able to justify in his own mind his peculation on the ground that his

employer actually owes him the money he is stealing. Once he has started to take the money of his employer it becomes increasingly easy to steal again and to enlarge the individual amounts embezzled. This may account for some of the cases in which the embezzler advances the defense of inadequate income and yet the amount stolen may greatly exceed any salary that he could have reasonably expected.

The official of one surety company advised, "It has been our experience that whenever economic conditions are bad, fidelity losses increase in number and size. This is particularly true among the so-called 'white collar classes' whose income is not normally increased to meet an increase in the cost of living. This does not necessarily mean that embezzlements by this class are attributed to increased living expenses. On the contrary, most of the money embezzled is spent for other purposes, the outstanding one being gambling." Several surety companies listed inadequate income as a major cause of defalcation.

Other Motives

In many instances the employee may have become an embezzler as a result of a combination of several of the factors previously mentioned. Many other factors also contribute to embezzlement. Surety companies have attributed employee thefts to such factors as finan-

cial pressure due to losses in other business activities, a past criminal history, mental irresponsibility, low morals, improvident investments and revenge. An official of one surety company stated, "We have seen several cases where resentment was the cause of a dishonest act. A young messenger who had been severely reprimanded, and as he thought unjustly so, tore up a large certified check that had been given to him for delivery. Another employee asked for a raise in pay. He was refused and thereafter he stole \$10 each week from the cash drawer."

In attempting to determine the causes of embezzlement or any other type of crime, it should be borne in mind that human behavior is extremely complex. Some criminologists would vigorously protest that the actual causes of embezzlement lie much deeper than such factors as gambling, extravagant living standards, unusual family expense and undesirable associates. They would assert that these factors merely precipitate the criminal offense while the true cause of the embezzler's activities is to be found in the personality make-up of the offender which is besieged with internal conflicts and maladjustments. It is undoubtedly true that the employee would not become addicted to the gambling habit nor would he try to live beyond his means or associate

with undesirable companies if he did not have a basic weakness in his personality make-up. But it makes little difference whether we refer to such factors as "causes" or "precipitants." They are extremely important in any consideration of embezzlement and methods designed to reduce it.

Lax Accounting Methods and Supervision

Frequently the employee who embezzles funds has advanced himself to a position of trust by faithful application to duty throughout a long period of employment. Over a period of years he has earned a reputation for honesty and trustworthiness. Due to his extravagant mode of living, illness or gambling, he may find himself desperately in need of money. Because of the position he holds he may be in custody of funds of considerable size. But the motive or desire to steal will consciously or unconsciously be weighed against the risk of prompt detection. Proper accounting systems with checks and balances and efficient personnel supervision will serve as a deterrent against employee dishonesty.

The problem of reducing employee dishonesty to a minimum is an important one. Many employers who have never suffered losses through embezzlement may be inclined to minimize the threat that is always present. They may point to the fact that burglaries and robberies are re-

ported daily in the press whereas newspaper accounts of embezzlements are relatively few. It should be borne in mind, however, that perhaps most of the embezzlement cases are disposed of through the discharge of the employee without the initiation of prosecutive action. Some companies have a definite policy against prosecuting dishonest employees. In addition, the losses in the exceptional cases that are publicized are frequently minimized in newspaper accounts. The employer may withhold many facts in order to avoid unfavorable publicity. The total amount of money lost annually through embezzlement, if the truth were known, would reach astronomical sums. Available statistics of surety companies reflect annual losses which run into millions of dollars. But such figures do not show the

complete picture since many employers do not carry fidelity bond insurance. And the total losses of those employers who do bond their employees are far in excess of the amount of the obligation of surety companies.

The true losses, however, cannot be computed in terms of dollars. Most embezzlers were respected and valuable employees prior to their defalcations. They were without criminal propensities and in many instances they would never have turned dishonest had reasonable precautionary methods been exercised. To take steps that will successfully prevent embezzlement is to save many human lives from ruin. The employee, as well as the members of his family, is saved from the stigmatizing effect of a criminal record.

Minor Crime

Our contributor was acting on the Advisory Board, assisting registrants to fill out their questionnaires, when the following conversation took place.

Advisor: Being a minister I don't suppose you have ever been convicted of any crime.

Registrant: Well, only a *minor* crime.

Advisor: Oh, they are not interested in traffic violations, or if you got drunk before you saw the light.

Registrant: Well this was only a *minor* crime.

Advisor: Well, what was this *minor* crime?

Registrant: They called it "contributing to the delinquency of a minor," but she was only seven years old and I only did six months for it.

Contributor: Ray B. Compton,
Roseburg, Oregon.

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By Jury, By Heck

By STEPHEN J. SWISS of the New Jersey Bar

THERE we wuz, just me and Looney, my friend Looney and me. There we wuz on the bench under the elm in front of the firehouse—just mindin' our own bizness. We just come from Ike Seward's place where the beer is good an' cold, an', besides, there's a coolness in Ike's place. There wuz a heat outside this mornin' even at nine. So me an' Looney, my friend Looney, we just sits there, amindin' our own bizness, watchin' the people an' the cars agoin' up an' down Main Street.

Ah, but that beer wuz good. But Looney, he wuz broke, an' my wife, good woman she is, is kinda strict wit me.

So there we wuz, me an' Looney, my friend Looney an' me, mindin' our own bizness. First thing ya knows, there wuz Constable Perkins acomin' down Main Street in his ol' jalopy. He wuz abuzzin' along at fifteen mile an hour, an' he spied us asittin' there amindin' our own bizness.

'Hey,' sez he, 'you two wanna make a dollar? Each?'

'Whut's the ketch?' sez I ta him, eyein' him close. Ya know, ya gotta watch these here fellas that has dealin' wit the law. First thing ya knows, ye're sorry.

'There's gotta be a trial by jury, by heck, afore Justice o' the Peace Morton today. There's gotta be twelve men on the jury. We gotta hev two more,' sez he.

Weel, I figgered I had nothin' better ta do, so Looney, my friend Looney, an' me, piles into the constable's jalopy, an' away we goes.

Pretty soon there we wuz. There wuz the Town Hall abuzzin' an' abustlin', showin' a bit o' life fer a change. Me an' Looney, my friend Looney, goes in an' it looks iike they wuz all set ta go. We wuz shoood into the jury box, me an' Looney, an' I takes a look aroun'. There of all people wuz Kibitzer—on the jury!! Of all the dopes—there wuz he. There wuz Dozey an' Jake—good men, good men, my friends Dozey an' Jake—an' there wuz Hap an' Lou an' Shifless.

There wuz ol' Herb Morton asittin' in a black gradjewatin' dress sober as a jedge. He 'ud alooked more ta home in his hardware an' grocery store asellin' cheese. But there he wuz, Justice o' the Peace Morton.

Pretty soon, the fat, ol' stuff-shirt of a Lawyer Hinton gits up an' sez, 'I moves the case of Lawton versis Bonner.'

'So,' sez I ta meself, 'Banker Lawton is asuin' ol' Sam Bonner. What fer, I wonder?'

Herb Morton, sober as a jedge, sez, 'Perceed.'

So ol', fat Lawyer Hinton, ol' stuff-shirt Hinton, comes over ta us an' sez, pretty as you like, 'Gintlemin of the jury.' Git thet, git thet, 'Gintlemin.' 'Gintlemin of the jury,' he sez, 'the plaintiff in this case is Homer Lawton. He is suin' Sam-u-el Bonner. He is suin' Sam'l Bonner becuz Sam'l Bonner did carelessly an' negligintly run his car inta Homer Lawton's car.' Then he gives us a spiel about Sam Bonner's dooty. He sez thet Sam Bonner broke his dooty. He sez becuz Sam Bonner broke his dooty ta be careful thet the accidint happened. He sez becuz the accidint happened Homer Lawton's fender wuz mashed, an' thet Homer Lawton had ta pay eleven dollars an' sixty-five cents ta hev it fixed.

'Now ain't thet too bad?' I sez ta meself. 'There sits ol' Banker Lawton, ol' Midas Lawton, wit piles o' dough, an' he wants eleven simoleons from poor ol' Sam Bonner. He got some crust. Pussonally, I don't think he's got all his buttons; mus hev a screw loose upstairs.'

Then Lawyer Hailley gits up. He tells thet it wuzn't Sam's fault. He sez it wuz Lawton's fault. (Thet's more like it.) He sez thet even if Sam Bonner wuz careless, Mister Lawton wuz partly ta blame, too, cuz he

din't look out either. He sez thet if enythin', they wuz both ta blame; they wuz both careless. Then Lawyer Hailley sits down.

Ol' stuff-shirt, fish-face Hinton then sez, 'Mr. Homer Lawton,' an' Banker Lawton, ol' Midas Lawton, gits up an' comes for'ard. They makes him put his han' on the Bible an' asts him if he swearsta tell the truth. He sez, 'I do,' like he wuz gittin' merried. He sits down, an' Lawyer Hinton, ol' fish-face Hinton, asts Banker Lawton ta tell the gintlemin—gintlemin, min' you—of the jury whut took place. Banker Lawton, ol' Midas Lawton, tells how he parks his wagon this day in fron' of the bank. He sez thet about an hour later he goes out an' gits in his car an' starts ta pull out when 'Bam' Sam Bonner hits his left front fender.

Pooh-pooh fish-face Hinton then asts if he looked ta see if enythin' wuz comin', an' ol' Midas sez he wuz careful.

'I objec',' sez Lawyer Hailley. 'Let him tell whut he done an' how he done it, an' let the jury jedge if he wuz careful. Thet's whut the jury is here fer. It's up ta them ta decide if Mister—git thet—Mister Lawton wuz careful.'

'Thet's good,' sez I ta meself. 'Let him tell whut he done an' how he done it, an' me and Loeney, my friend Loeney, we'll detarmin if he wuz careful er not, an' if he's ta blame er not.'

'Whut didja do jus' afore ya pulled out, Mister Lawton?' sez Hinton, callin' him Mister Lawton like they don't know each other when I knows the two is as thick as thieves—boy, you sed it, as thieves—an' chummy an' all thet, too.

Lawton sez he looked back an' he sees nothin' wuz acomin' an' pulled out.

'Enythin' else?' sez his lawyer.

'No, the next thing I knows I'm hit.'

'Didja pull out fast or slow?'

'Slow to middlin'.'

'Enythin' else?'

'No.'

Ol' fatty Hinton, stuff-shirt Hinton, looks kinda flustered. Then he asts, 'Didja put yer han' out jus' afore ya pulled out?'

'I objec', sez Hailley. 'Thet's a leadin' question. He shudda asted him, 'Whut else didja do?' The way he asts it he's atellin' him whut else he done. He's atellin' him the answer. He's areminin' him ta tell he put out his han'.'

'Objection sestained,' sez ol' Herb Morton—I mean Jedge Morton. I keeps fergittin' ol' Herb is now a jedge.

'What else didja do?'

'I put out me han'.'

I begins ta hev my doutz about thet. I wuz awonderin' if they hed amade thet one up. Seems kinda fishy ta me ol' Midas din't remember til Hinton, his good friend Hinton, hadda remin' him of it. Ol' Midas hes a good

memry. He remembers who owes him money an' how much.

'Thet's all,' sez Hinton.

Then Lawyer Hailley gits up. He walks over ta Lawton an' sez, 'How long ya been drivin' a car, Mister Lawton?'

'Nigh on ta tweny year.'

'Ever hev eny accidints afore?'

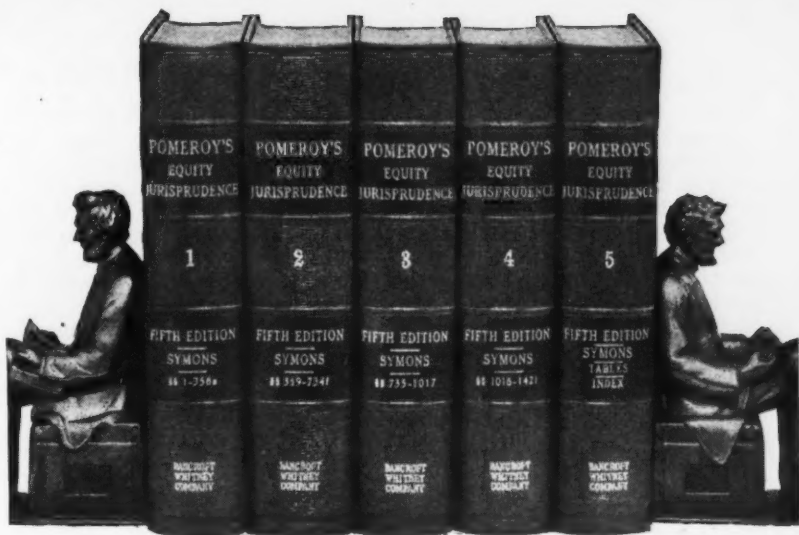
'Harrumph, poof, poof, I objec', sez Hinton.

'Whut fer do ya objec'?' sez Herb the Jedge Morton.

'We aah heah,' sez Hinton, tryin' ta sound like a Hahvahd man, 'ta detarmin who's ta blame fer this accidint—not fer eny accidints thet heppened years ahgo. It makes no diffrince whut happened in them other cases. They're finished. We uz dealin' oney wit this one. Mebbe a man cud be ta blame nindy-nine times an' the hundrith time he cud be careful an' not ta blame. We gotta detarmin who's ta blame this one time.'

'Anyhow,' sez I ta meself, 'everybody knows ol' Banker Lawton drives like a durn fool. He thinks he owns the town jus' cuz he hez mortgiges on mos people's property. Everybody knows he gits in more accidints than Lucifer hisself.'

The Lawyer Hailley gits through wit ol' Midas, an Hahvahd Hinton sez, 'Hank Renner,' an' Hank Renner, my friend Hank, gits up an' takes the stan'. I begins ta wonder whut good ol' Hank has got ta do wit



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this. Good ol' Hank keeps amandin' his own bizniss afixin' cars.

Lawyer Hinton, ol' stuff-shirt Hinton, asts Hank how much it cost ta fix the car an' how much it wuz banged up an' all thet. Then he shows him pitchers of the bashed fender. He hez two or three pitchers an' he keeps apradin' back an' fort with them, showin' 'em ta everybody. There he wuz apradin' back an' fort wit Exhibit A, Exhibit B, an' Exhibit C, bellowin' like a bull. Him an' his Exhibit A, Exhibit B, an' Exhibit C.

Then there wuz thet ol' bizibody Missuss Hennib. What a name. It fits, boy, it fits. Ain't it enuff she don't let her Lem alone? He's so scairt now thet enybody cud guess he wuz her husban'. She's got a tongue thet's awaggin' all day long. But there she wuz, ol' bizibody Hennib.

Lawyer Hinton wants thet she shud tell whut she knows. He sez, 'Missuss Hennib, where wuz you on this day at about ten o'clock in the mornin'?"

'In the bank,' she snaps right back.

'An when you come out, whut didja do?"

'I wuz atalkin' ta Lem.' I sez ta meself, 'Talkin' at him's more like it.'

'Then whut happened?"

'I went back into the bank; I heered a loud noise, an' when I come out, Lem sez there wuz an accidint an' thet Sam'l Bonner

wuz acomin' down the street, an' thet

'I objec', sez Hailley. 'Whut Lem sed is hearsay. Let him swear on the Bible first an' let him take the stan' so's I kin cross-question him. When he wuz atellin' his wife this, he wuz under no obligashun ta tell the truth, an' I had no chanct ta cross-question 'im.'

'Thet's right,' I sez ta meself, 'If Lem knows so much, let him tell it. Besides, he's the one thet seen it all. Enyhow, I don't think he sed nothin' when he wuz wit his wife. He don't git a word in edgewise.'

I wuz glad Missus Hennib, ol' bizibody Hennib, cudn't say no more. Fer once she wuz shet up. Thet wuz the end of her story. Good thing, too, or we wudda bin there all day alistenin' to her. She wudda probly got in her spiel on the Temperance Union, too. Boy, wuz thet good. Ol' lady Hennib, thet ol' gossip Hennib, shet up at las'.

Finally comes Sam Bonner. He sez he wuz goin' slow—that he wuz watchin'—thet he cudn't help hittin' ol' Midas—thet he wuz right even wit Midas's car when ol' Midas pulled out.

Then ol' Hinton tries ta give Sam the bizness. He cross-questions him no end, tryin' ta stump him. He sez, 'Cudja hev stopped?"

'I objec', sez Hailley. All these lawyers does is objec', objec'. They makes me sick. I wanna hear it all. How kin I

do right if I doan know all the facks? How can I do justice if I doan know all the facks?

Hailley sez, 'The question calls fer a concllooshun of fack. We are here ta detarmin whut happened—not whut mighta happened, whut cudda happened.

Hinton arge'ed thet the question wuz propair; thet it wuz hyppothet-i-cul; thet it wuz wel-established by law. But Hailley, he don't give in; he still keeps asayin' the question calls fer a concllooshun of fack.

These lawyers, tryin' to ack smart wit them big words.

Ol' Mort—Jedge Mort—duzn't know whut ta do. He don't know whither he's acomin' or agoin'. Both lawyers is

ashowin' him books wit the law in 'em. 'They caain't both be right,' I sez ta meself. 'Mebbe one is haff right, mebbe haff wrong.' But I gives up then and there, an' I looks at Loeney. Loeney, he's aconcentratin' ta beat all git out. Fer a while I thinks mebbe Loeney is understanin' everythin' thet wuz goin' on. But Loeney, my friend Loeney, he's as thick as molaases in January. Yit he had me fooled fer a minnit.

Weel, Mort don't let Hinton hev the answer, so thet wuz thet.

Weel, preety soon it's all over an' ol' Herb Jedge Morton tells us we gotta figger out who's ta blame, an' Constable Perkins drags us out ta the Town Council room an' tells us thet's the jury room. He locks us up an' sez ta knock when we wuz ready.

Weel, I goes ta Loeney, my friend Loeney, an' sez, 'Weel, whutda think, Loeney?'

'I doan know yit,' he sez. 'Whutda you think?'

'You got some idee, don'tcha, Loeney?' sez I.

'Mebbe I hev, an' mebbe I hain't. How you agoin' ta vote?'

The louse Loeney, my friend Loeney, he's aplayin' cagey. He wants thet I shud show my hand first like he wuz tryin' ta sell me sumpthin'. Of all the consarn, contrery idjits, my friend Loeney. He oughta hev stood up ta his cabin amongst the hoot owls an' the rattlesnakes.

So I sez sharp, 'Niver mind

My Neighbors

By BILL PAULSON



"Communism is just like sellin' plugs to fishermen. It don't matter whether the bait'll catch something, it's the sale they're after."

how I'm agoin ta vote. You vote the way ya wants, an' I'll vote the way I wants. How you goin' ta vote?"

"Niver mind," he snaps, "You vote the way you wants, an' I'll vote the way I wants."

So we all votes, an' I'm not atlakin' to Loeney.

I votes thet Sam Bonner ain't ta fault, an' in the end thet's the way it is. So we bangs on the door, an' away we goes. We files in an' Kibitzer, thet dope Kibitzer, he gits up ta say the verdick. Kibitzer gits up an' he almos' gits it twisted (I wudda broke his neck), but finally he blurbs

out thet we wuz all fer Sam Bonner.

Weel, I feels thet it's over, an' feel thet I done right by my conshus—I think I done justice—when down comes ol' Herb Justice o' the Peace Mort aflashin' a buck apiece in front of us. It's our fee he tells us fer bein' jurymen an' he sez now we kin go.

I jumps up an' away I goes, but I feels sumbudy is right behin' me, an' I turns an' there is Loeney, my friend Loeney, as ahappy an' asmilin' as cud be. He ain't sore no more. He's atryin' ta beat me down ta Ike Seward's place.

Sublime Nerve

Some young lawyers lose their heads at the first sign of defeat, and by so doing insure it. Not so one old lawyer, however. His presence of mind has obtained a favorable verdict on many occasions when the odds were decidedly against him. Recently, it is said, he instructed a very young client of his to weep every time he thumped the desk in front. Unfortunately, however, the young lady mistook one of the barrister's impressive taps for a decided thump, and burst into a fit of sobbing at the wrong moment.

"What's the matter with you?" demanded the presiding judge.

The young lady looked up and answered through her tears: "He"—indicating the barrister—"told me to cry every time he thumped the table!"

Here was a nice predicament, surely enough to unnerve the coolest. But the astute lawyer was equal to the occasion, and actually turned the circumstance to his advantage.

"Gentlemen," he said, impressively, turning to the jury, "how can you reconcile the idea of crime in conjunction with such childish candor and simplicity? I await your verdict with the utmost confidence."

And he was duly rewarded.

Life Sentence by Judge Farrant

CONTRIBUTED BY

JOHN O. KERCH of the Chadwick (Ill.) Bar

ABOUT the year 1905 Warren Sanders, at Dixon, Ill., was sentenced to the state penitentiary for life for the murder of his mother-in-law. At the same time he also killed his wife. He pleaded guilty to the charge of killing his mother-in-law, and Judge Farrant passed sentence on him. Pleading guilty to the crime saved him from the death penalty. The state demanded the death penalty. In passing the sentence the judge said, "Warren Sanders, you are now before the court to receive sentence on your plea of guilty for the murder of Melva Griffith. It has become almost a recognized principle of criminal jurisprudence that when one charged with a grave offense no longer stands in defiance of the law, but comes into court confessing his crimes and asking for mercy, that leniency will to a certain extent be extended. Acting upon that principle I shall spare your life, but inflict punishment that is more terrible than death.

"If you have any lingering hope that you are to spend only a few years in prison, free your mind from that deceptive thought. When your hair has

grown gray, fading sight has come and your body is feeble with age, you will still be within the cold prison walls; no home save the criminal's cell; no associates except those like you who have broken the laws of God; no hope so far as human power can grant; a living death within the abode of the condemned.

"The patter of the feet of the one you love so well will never again be sweet music in your ears, her childhood kiss will not warm your lips nor her little dimpled arms encircle your neck. You will be alone, all alone. There will be but little rest for you either of mind or body on this earth, and if you hope for a peaceful immortality beyond the grave, if possible, make your peace with God."

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A TRIAL LAWYER'S GREATEST THRILL

By BORDEN BURR

of the Birmingham (Ala.) Bar

Condensed from The Alabama Lawyer, October, 1947

HAVE YOU, as an old trial lawyer, sought to select and separate from the many your greatest courtroom trial thrills? Mine came in a crowded courtroom of Shelby County, Alabama, when I had the opportunity, before a petit jury, with expanded chest, in unexpected stratagem, and to an unsuspecting jury, to call out "Mr. Sheriff, as our next witness call *General William Crawford Gorgas*."

In 1912 some thousands of citizens of Shelby, Chilton, Coosa and Talladega Counties, represented by enterprising members of our profession, conceived the conviction that the Alabama Power Company through the erection of its first dam on Coosa River and its negligent causing and maintenance of the impounded waters to serve as a breeding place of an invading army of mosquitoes, had caused all of the malarial sickness within several miles of the impounded waters. Over a thousand suits were brought charging the Power Company with legal responsibility for the malarial sickness, and in some instances



death, caused by this alleged negligence. The Power Company was a financially weak infant.

We began the study of malaria, its causes and effects. This led us into the life cycle, habitats and love habits of the *Anopheles mosquito*, especially the female of the species, the transmission by her of malaria as the sole source of malarial sickness, and the effective control of this sickness by means of proper sanitation. We learned that at this time the medical profession in Alabama had but little knowledge and even less experience in this vital health field. We also learned that General William Crawford Gorgas was the "last word" in respect to these questions of such supreme importance to the health and happiness of the human race; that it was his persistence, energy, research and vision which had vanquished yellow fever in Havana; had made possible as "a triumph of medical skill the construction of the Panama Canal; that it was Gorgas, the Redeemer of the Tropics, who made possible its safe and humane construction";

and that as a result of his matchless achievements, the noxious, filthy, fearful, destructive scourges of yellow fever and malaria had been placed in the category of preventative and easily eliminated diseases. But this is no place to recount further the life and works of this greatest of Alabamians.

Dr. Gorgas, then Surgeon General of the United States of America, visited the impounded waters, the surrounding territory, the premises of the many plaintiffs, and made for us a full report and analysis of conditions as he found them. When presenting the situation to General Gorgas, he spoke of his life as a boy when his father's family lived near Brierfield in Bibb County, Alabama, and of his love for his native State of Alabama. He agreed to examine the newly made lake and surroundings. "Whatever experience I have," he said on that occasion, "should be available in the utilization of man's achievements for the well-being of the people of my native State. Whatever the facts may be, I will go to Alabama, examine the situation, and make them known." Unknown to any except those who were handling the defense, General Gorgas came to Columbiana and was kept available as an unsuspected surprise witness. And now for the trial. The case was *Hand v. Alabama Power Company*.

The plaintiff presented many witnesses who testified as to con-

ditions relating to the impounded waters, the swarm of mosquitoes (in quantities making gray the air, and of a kind and character unknown prior to the impounding by the Company of the Coosa); and the discomforts, sickness, etc., allegedly proximately resulting therefrom. The defense, aside from proving the location of plaintiff's premises, *their distances from the nearest of the waters*, and the fact that malaria had been prevalent in the communities for generations, paid but scant attention to this evidence. Then came the plaintiff's medical testimony. Local medical practitioners from the several counties testified that malaria was solely transmitted through the bite of the female Anopholes mosquito; that there was an unusual prevalence of malaria in the supposedly affected area, and the family physician of the plaintiff testified as to his malarial sickness and that of his family. The defense, following the strategy of laying a firm foundation for an undisclosed defense and creating the proper atmosphere for the appearance of an unsuspected but vital and unimpeachable witness, in cross-examining these physicians assumed their integrity, made no question of their veracity, but again and again and again obtained from them the frank and even proud admission that their testimony as to the causes of malaria, the breeding and habits, etc., of the

mosquitoes, was founded upon the research, the experiments, the reports and writings of the great Alabamian, the destroyer of the plagues of yellow fever and malaria, GENERAL WILLIAM CRAWFORD GORGAS; that they were, in effect, basing their entire testimony not on their own knowledge and experience but on what this great man had said and done; that he was the outstanding and preeminent expert and exponent whose shoes they were unworthy to unlace, and whose pre-eminence in this field they were happy to affirm and acclaim. Thus by this cross-examination of plaintiff's witnesses the name and fame of *General William Crawford Gorgas* reverberated in the crowded courtroom and set the bells of admiration ringing in the minds of everyone in the courtroom, including the jury. And then came my greatest thrill when (after some defense testimony showing location and distance, etc.) I reared back and said, "Mr. Sheriff, call General William C. Gorgas."

As General Gorgas (only a few of us knew that he had been over the territory and was available as a witness) was sworn in and took the witness stand there was paid to him that greatest of tributes—pin-dropping silence on the part of everyone in the crowded courtroom. The jury, composed of "run-of-the-farm" farmers, literally moved to the edges of their jury chairs and in



popeyed wonder awaited the drama that followed. This was not only due to the fact that during the trial the name of Gorgas had been deified, but because the presence of the man in itself established his greatness. He was of commanding presence, straight as an arrow. His white hair gave an aurora of benediction. His eyes were as headlights gleaming honesty and candor. His diction was clear and simple. His manner was understandable. All this and more established his right and title to the full recognition which had been given during the trial to his justly accorded pre-eminence in the field and questions under consideration. "That particular witness was something never to be forgotten. His character was pictured in a noble face, full of personal charm as well as radiant with the intelligence of a genius. His was the strong soul, gentle, but tempered with fire, fervent, heroic and good, the helper and friend of mankind."

When we began General Gorgas' examination our effort to present uninterruptedly to the jury the chronological and complete history of the conquest of the plagues of yellow fever and malaria as a foundation for the expert's opinion on the local conditions in the case was met with objections on the part of adverse counsel (you know the type, irrelevant, immaterial, incompetent, illegal, etc., etc.), but it soon became evident to them

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that the jury, almost angrily, resented their interference and General Gorgas was allowed to tell the story "fully and simply and as to a little child." Modesty is the true badge of greatness. It would have been difficult for one—not knowing—hearing General Gorgas testify, to realize that he was the one most responsible for the victory over malaria and yellow fever. The word "I" appeared only infrequently in his evidence and only then when it was forced by the questions propounded. For two or three hours he held the intense interest and the absorbing attention of everyone as he told in simple words of the nauseating death, destruction, degradation; the loss of fertile lands caused by prevalent epidemics of yellow fever and malaria; of man's, for centuries, utter ignorance of the causes or of the remedy; of man's heroism and martyrdom; of the experiments with men as guinea pigs which finally proved beyond question that the mosquito was the cause and that sanitation was the remedy.

After this general, interesting, complete and romantic history, the witness testified as to the sanitary conditions surrounding the impounded waters; the unsanitary condition around the premises of the plaintiff; the proven ways and results of proper sanitation which had been used by the Power Company, and to the fact that the female Anopholes is a weak flyer and never travels, unless storm wind blown, more than two hundred yards from the place of her birth (the undisputed evidence showing that the premises of the plaintiff were from the nearest point of the impounded waters a distance greatly in excess of two hundred yards), and as to other matters which were in opposition to plaintiff's claims.

Other testimony, on redirect, followed the evidence of the General but it was anti-climactic and out-of-the-window inconsequential. A verdict for the defendant followed in short and due course, and thus ended the nisi prius trials of the mosquito cases.

Confidential

The junior partner, who was in love with her, was talking to his secretary when he saw the boss come in.

"Let's see," he said, trying to change the subject quickly, "where was I?"

The girl had not seen the boss.

"You were talking of our future, darling," she said, "our home, the beauty of a room by firelight and how you'd like to push old big-fish in the teeth."

—Cosgrove's.

AN ANSWER IN CONDEMNATION PROCEEDINGS

Contributed by
D. J. BROOKREN

THE COUNTY was seeking to condemn the right of way for a "farm to market road," and the State Highway Engineers had prepared field notes for the right of way, and a Texas lawyer was struggling to interpret them, not being familiar with the technical words, and finally worked it out, as shown in this paragraph of his answer.

(4) The Defendants further respectfully show to the Court, that the right of way herein sought for a road in the name and guise of a farm to market road, as laid out by the cavalcade of engineers, charged with New Deal speed, and primed with portal to portal pay, according to their field notes, as interpreted by a country lawyer, who does not understand the meaning of "Station plus" and "Station minus," as used therein, but more familiar with the old time method of surveying with a coon skin, twisting its tail for variations, and throwing it in for good measure, is as follows:

BEGINNING: at a stake set in the Southwest corner of the Burnett pasture, some three rifle shots East from the "Nar-

rows," that backbone of bird eye clay separating the Brazos from the Wichita River, where it is well established, by legends of the old time buffalo hunters, that a drop of water, falling upon its fin sharp crest, is severed in twain, its South half flowing into the Brazos River, some four miles to the South, thence down its time honored channel, through the territory made sacred by traditions of Sam Houston and the early making of Texas history, into the waters of the Gulf of Mexico, where the sulphur fumes from modern Freeport now tinge its salty brine;—while its Northern half flows down the Southern ramparts of the Wichita Breaks, between its picturesque pinnacles, into the Wichita River, named for those former redskin Chiefs; thence with its meanders, between its cocklebur inclosures, into Red River; thence with this River into the mighty Mississippi, the father of waters, and with the muddy current of this sturdy stream, passing under the shadows of the stately Huey Long monuments, and beneath his surpassing (Seven Wonders of the World) bridge,

on out through its sprawling delta, many highwayless miles from its divorced better half;

SAID BEGINNING point being inhabited only by meager bands of roving coyotes, whose ranks are being fast depleted by that pressure group, backed up by the wolf bounty, and jillions of hibernating rattle snakes, cosily coiled in the nearby caves, with not the trace or recollection of a farmer's abode, past or present;

THENCE: from this propitious point, said proposed right of way strikes out boldly to the North, distance 1313 feet, "plus and/or minus," where it plunges down the Southern embankment of the Wichita Breaks, into that strata of bird eye clay and baked blue shale, permeated with petrified fossil and bones of prehistoric animals, a terrain matched only by the "Bad Lands" of Colorado, and the eroded wonders of Bryce Canyon;

THENCE: here the engineers seem to waiver, and doubtless unable to explore the surroundings on foot or other means of travel, must have resorted to new deal science or radar to sound out the surrounding crags, peaks and canyons for places

that might yield to the onslaughts of the modern "Bulldozer," so they wiggle in, and they wiggle out, apparently always in doubt, whether to push on it, or back square out, until finally, at the foot of this Bright Angel Trail, a stake, near the threadlike Wichita River;

THENCE: here the project calls for a long, expensive, reinforced concrete bridge; purpose not stated, and use unknown, since the few coyotes crossing here prefer to wade the mud in search of crayfish;

THENCE: in like manner, ever upward, over and across the remaining miles of the Wichita Breaks, slicing a long narrow strip of land off one ranch, then crossing over and slicing off another from the adjoining pasture, until finally, after many vicissitudes and daring deeds, they surmount the Northern crest, and to—

THE END: a stake, near a lonely country graveyard, far from any known market, unless one of poor pickings for an itinerant tombstone peddler, and—

CONTAINING, no farm to begin; no market to end; no possibility of either between, and no prospects of useful travel seen.

Reading

"Happy is he who has laid up in his youth, and held fast in all fortune, a genuine and passionate love for reading."

—Rufus Choate

SOME POST-WAR REFLECTIONS

By ADLAI E. STEVENSON

*Member of the Chicago Bar; member of United States
Delegation to the United Nations General Assembly*

Condensed from Illinois Law Review, July-August, 1947

DURING the past two years we have passed through successive waves of optimism and pessimism across the whole spectrum of emotion—from the happy illusion that the United Nations was somehow a substitute for power politics and a guarantee of automatic peace, to periods of black despair, talk of another war and visions of the ugly spectre of two evil old worlds in hostile balance instead of one bright new world. But in spite of all the emotional gymnastics of the past two years, it would seem that the American people have matured very rapidly; that there is now a general awareness that making peace is harder than making war, and the obstacles and hazards infinitely more difficult to understand and to evaluate; that the hard realities of international life are no longer the monopoly of any region or group; that this is an era of world revolution and reorganization that has few historical counterparts, and that America is in the world to stay, not because it wants to be, but because it knows it can't keep out.

Another historic decision has been evolving for sometime and culminated in the Greece and Turkey bill, which I suppose it is fair to say passed the Congress not because they liked it but because they felt there was no safe alternative. From 1793 to 1917 American policy and legislation was based on three premises: (a) that wars were inevitable and a legal means of settling international disputes, (b) that since wars could be localized the United States should remain neutral, and (c) that international law protected neutral ships not carrying contraband and that, therefore, a policy of non-intervention and neutrality would not ruin our commerce.

The Italian and Japanese wars of aggression put an unendurable strain on both the spirit and rationality of the neutrality and nonintervention policy. Then the Lend-Lease Act, which followed the principle of helping those who were helping to defend us, ended the fiction of neutrality. And now we have rejected all three of the basic premises on which our policy has rested since Washington's

neutrality proclamation of 1793.

Now, assuming the conclusion that the United States is going to be a vigorous and permanent participant in world affairs is not premature, it is of historical importance for another and more obvious reasons. Because we then see for the first time the world balanced between two *non-European* states, the highly developed United States, with old ideas, and the undeveloped Soviet Union with new ideas. Surrounding areas are attracted like satellites to these planets by dependence, by fear, by racial affinity. Large areas and populations are exposed to both magnetic fields. Russia has little and wants everything; the United States has everything and wants little. Both want peace and security—Russia, to bind up her awful wounds and to develop her vastness and wealth; the United States to enjoy hers.

Must these two galaxies of power and influence some day collide? If we were ants we would probably have to answer in the affirmative. But we are not ants; we are rational human beings with at least the common spiritual heritage of the human race. The trouble is fear—fear of one another, fear of those ideas, old and new. Our old fear and mistrust of Bolshevism is aggravated by Russia's stubborn, acquisitive behavior. Russia's old fear of capitalist encirclement and counter-revolution is aggravated by a suspicion

that we would have been glad to see Russia and Germany both bleed to death in the war. The Soviet Press call us Fascist reactionaries and imperialists determined to dominate the world. We call them aggressors and imperialists determined to dominate the world.

What do the Soviets want? Just security, so that they, too, can live in peace? Or world Communism? Who knows? And they won't oblige us with a bill of particulars. Perhaps they don't know themselves. But, after two years of painful, stubborn negotiation, one thing is clear: they are determined to get all they can while they can, whatever the ultimate objective—defensive or offensive.

So, confronted with uncertainty of Soviet ambitions, the expansion of Soviet power, and the encroachment of Soviet ideas, our policy for world order and security is unfolding: resistance and assistance. Resistance to further political expansion because we know all too well that appeasement doesn't work. The Soviet Union—any state for that matter, not excluding the United States—is more impressed with power than with words. It's apocryphal, but the remark attributed to Stalin illustrates what I mean: "The Pope—who is the Pope and how many divisions has he?" So to make resistance effective we must stay strong and never disarm unilaterally again, meanwhile doing

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our sincere best to further rational control and limitation of armaments through the United Nations.

But political resistance alone is not enough. Political resistance without economic assistance won't suffice, because we've learned another lesson. At least I hope we've learned that prosperity, like peace, is indivisible; that you can't have an island of prosperity in an ocean of want; that given a choice between life and liberty, people will choose life.

Perhaps the greatest crisis in the world is the crisis of underproduction. Germany and Japan, the great producing centers, are crippled. In the economically advanced countries, devastated by the enemy and the liberator, production is still from 20% to 50% below the pre-war level.

The world is begging for our production while we talk of less work, more wages, higher prices and more profits. The higher prices go the less the precious foreign dollar buys and the more we will have to lend and give.



Case and Comment

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Can a free economy arrest the creeping inflation and forestall disaster? Or are the Soviets right and is another depression in the United States inevitable? With it will the whole fragile house come tumbling down and result in (a) universal chaos, (b) the extinction of capitalism, (c) universal Communism, or (d) war?

Let me remind you of some elementary things about the Russians. The factors of Communist ideology, ancient Russian habits of thought, and the

internal conditions there, in combination, have produced a suspicion, fear, and evangelical zeal that underlie our difficulties with the Soviet Union. These difficulties cannot be resolved by angry name calling and threats any more than you can break a colt by intimidation and roughness.

In the first place, Russia has never known peaceful, friendly neighbors. She has had to fight them all from the earliest times and the outside world has come to mean a hostile world. The external dangers of the past, real or fancied (and Germany and Japan were very real!) and the traditional fear and suspicion of foreigners has fitted nicely into Soviet requirements of ruthless discipline and purity of thought.

In the second place, the dictatorship of the proletariat has functioned through decisions imposed from above, not from the proletariat. A minority of trusted party members controls the will of the majority. The result is that opposition has always existed, and the internal security of the regime has been the constant preoccupation of the Kremlin. But the Soviet government naturally could not admit the existence of opposition. So the internal danger is treated as reflection of the external. Hence the purge trials, the talk of wreckers and saboteurs, always as agents of foreign powers. The external enemy has

been the convenient justification for the elaborate measures of protection against the internal one.

And bear in mind that the Soviets did not have to manufacture this fear psychosis. It was there, made to order, already. Czarist Russia was a police state.

Fear breeds abnormalities. A thread of persecution and apprehension runs through Russian literature. And there is a weird ancient superstition that Mother Russia's, Holy Russia's destiny is limitless. This messianic quality also fits nicely into the classical Communist concept of world revolution.

Like all those who hold beliefs with deep-rooted, fanatic conviction the Soviets will seek to propagate theirs without dilution or compromise. They are not hypocrites and the idea that we can somehow buy them out is insulting. They are not frivolous and the idea that we can somehow charm and talk them into acquiescence is foolish.

But historically, Russian diplomacy has been very flexible. They have always made sure they could retreat when they run into firm and final resistance. We have seen that repeatedly. In a military sense also their commitments never exceed their capacity. We must not be rattled by the belligerent Soviet idiom—the discourtesy, epithets, and abuse they pour on bourgeois

governments and peoples. Their potential power is enormous, but so is their present weakness behind the rude, rough facade.

And history records the gradual cooling of the passions engendered by all revolutionary movements.

Competent observers suggest that the emotional power of Communist party doctrine in Russia is diminishing; that the urge for better relations with the outside world—for freedom from fear—is closer to the surface than we realize. The fact of a friendly world—if it is a friendly world—will gradually penetrate, will gradually dissipate the hard shell of fear.

I think you will conclude that whether and how much of the democratic tradition survives depends less on ideological sympathies and more on the positive economic and social achievements of the Democracies, and particularly in those great areas that are caught between the two magnetic fields, East and West. We cannot rest on our ancient laurels. We know that a full belly is a better defense against totalitarianism than an atomic bomb. We know that you can't stop ideas with soldiers; that in the long run there is only one defense against this creeping disease, and that's healthy flesh. To improve the well-being of the masses is today a mission commanding the same kind of moral fervor that once went into the task of winning their souls.

A Letter to the Tax Collector

(ANONYMOUS)

"YOU have been trying to collect an income tax balance from one R— R—, late of Winchendon, Massachusetts. This, despite the fact that you have been informed, several times, that the man in question departed from this wicked world on May 11, 1943, leaving no estate to be administered but many sorrowing creditors who wished that he had. Now you send a final notice to this delinquent that you hold a warrant of distraint for the said taxpayer. In these circumstances, the family and friends of the deceased have given this problem a thorough intellectual mastication, after which, they retained me in the name of their departed relative and friend to convey to you the sum total of their collective wisdom and co-operative spirit.

"If you should decide to send a U. S. Marshal or other officer to serve the warrant, you will find the taxpayer, his kith and kin avow, comfortably ensconced in a cubicle 7 x 3 x 6 in St. Mary's Cemetery on Glenallan Street in said Winchendon. Your Marshal might first try whistling. If that brings no response, place a pint of Johnny Walker (Black label) within arms reach of the tombstone. If that doesn't bring him up, then you will sure-

ly know that he is deader than a doornail. If your Marshal knows how to commune with the dead, he might be able to coax the fellow to explain his apparent delinquency.

"However, if your Marshal is in no hurry—and I never saw one that was—let him bring some sandwiches and a comfortable chair with him and sit himself down with a copy of "Forever Amber" and wait around until Resurrection Day. On that Day of Days, the man you are looking for will undoubtedly stand up for a ghostly seventh-inning stretch at which time the warrant can be served.

"Another happy thought might be of added consolation to you. If the taxpayer refuses to budge until he hears Gabriel blow his horn, don't let it bother you. For on that day, when the dead shall live again, you will be able to demand, not only the tax due, but also you can ask for interest to the Day of Judgment. What you get from this guy alone will be enough to pay off all the national debt accumulated during the past golden decade. If you are a good Democrat—as you should be—that feat alone should entitle you to a great reward in the great Hereafter. There is one possible hitch to this happy

thought. You see, my dear Collector, it all depends on whether the man you want is in Heaven or in Hell. If he's in Heaven, you have nothing to worry about—your money is as good as a Victory Bond. But, if by chance he should be in the other place, I'm afraid you're going to have a hell of a time, because some damn-fool lawyer is sure to get hold of him and put him through bankruptcy. Then, you'll be out of luck for fair.

"But meantime, do as I suggest. Go down to see him and have a little chat with him. He may tell you where his permanent domicile is, in which case you'll know where you can go if your want your money.

"If you should decide to talk to him, will you be good enough to tell him that my charge for writing this letter is \$5.00 and that I don't want to go chasing all over Hell for it."

Nolo Contendere?

One of the most delightful books about lawyers is the autobiography of John C. Knox, "A Judge Comes of Age." In it he relates many of his experiences on the bench. One of the most interesting stories concerns the cross-examination of a "rotund, cherubic, soft-voiced and lisping" Negro who was testifying against his former companions in a mass bootlegging trial. After a series of vilifying and browbeating questions directed to this witness, by one of defense counsel, each of which boomeranged, "the attorney," recounts Judge Knox, "certain now that he had as yet failed to create the impression before the jury for which he had hoped, decided to make one more effort. It seemed to me that I saw certain signs of desperation. The lawyer pointed dramatically at the Negro.

"For what else have you been arrested?" he demanded.

"Well, suh," same the soft reply, 'theah's nothin' Ah kin recollect.'

"Do you mean that?" shouted the lawyer.

"Yes, suh. Ah means whateveh Ah says, suh."

"With a solemn manner and a deep voice the lawyer offered another question.

"Do you mean to tell this court and jury that you were not arrested for rape?"

"Oh, yes, suh," he smiled. 'Ah clean forgot 'bout dat. It jes' slipped mah mind.'

"And what did you get for that?" shrieked the lawyer.

"I listened intently for the answer, and so, I am sure, did every juror. Yet the Negro's manner did not change an iota, and his voice, if anything, grew still softer.

"Married," he replied."

—Dicta.



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